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The Antinomies of Social Justice

Thomas A. Spragens, Jr.

Theories of social justice are either hegemonic (defending a single determinate standard), skeptical (finding social justice to be radically indeterminate if not meaningless), or pluralistic (claiming that we can disqualify all but a handful of standards, but that we cannot definitively adjudicate among these). I offer here a variation of the pluralistic view, arguing that a single standard cannot be definitive because of what is termed the antinomies of social justice. These antinomies arise where the demands of justice collide with elements of the gratuitous that are morally valid or are practically unavoidable. Where this occurs, all possible distribution rules turn out to be unfair. An important implication of the argument is that liberal democracies cannot find their grounds for consensus, as John Rawls contends, in a common attachment to principles of justice. Instead, common interests and civic friendship will always be necessary supplements to the sense of justice as a source of social bonds in a free society.

The publication in 1971 of John Rawls's landmark book, *A Theory of Justice*, inspired a new chapter in moral and social philosophy dealing with an old question: what is social justice? A voluminous literature has since appeared to elucidate the issues raised by Rawls and, in some cases, to offer competing views.

These discussions have had an invigorating effect on both moral philosophy and on liberal political theory, raising and clarifying significant questions left dormant during the postwar period dominated by positivism and the end-of-ideology ideology. It seems possible, however, that the final outcome of the whole episode may replay a familiar cycle: against the backdrop of a skeptical era, a powerful moral conception of social justice is given voice; serious and sustained disputation surrounding the conception fails to produce any clear consensus; chastened by this experience, a new generation of skeptics arises; and the question of social justice is shelved until once again complaints about specific social injustices reawaken concern and generate the cycle anew.

A more constructive outcome of the recent controversies, however, might be a sharpened awareness of the nature and limitations of the very conception of social justice—an appreciation of why we cannot seem to live without the idea but why we cannot seem to live comfortably with it either. The clash between competing moral points of view in recent debates, because of the

acuity of the various leading disputants, has successfully illuminated some of the most fundamental sticking-points between the alternative accounts. By identifying these sticking-points and reflecting upon their source, we can be led to an appreciation of the antinomies of social justice.

Logic and experience alike suggest three meta-approaches to the conception of social justice. We can call these approaches the hegemonic, the skeptical, and the pluralistic.

Adherents of the hegemonic approach are the optimists of the lot. They believe that it is in fact possible to ascertain a single substantive standard of social justice that is rationally persuasive. The most ambitious of these theorists of social justice seem to believe that their conception should be capable of universal acceptance—by, at least, all rational people of good will. If the principles of justice are derived from eternal ideas, or from the demands of pure reason, or from the inevitabilities of a rational cosmos, one might attribute to them a legitimate hegemony over any contrary notions. In very different ways, then, the claims of Platonic *dike* and Marxist distribution according to need might be pressed with hegemonic force.

Although it sounds at first blush oxymoronic to say so, the recent theories of justice offered by Rawls, Nozick, and Ackerman embody a more modest hegemonic claim. That is to say, these theorists of social justice find it neither possible nor necessary to claim that their arguments must be persuasive to all rational people of whatever time, place, and moral orientation. However, they do seem to believe that their accounts should be persuasive to all who inhabit the moral universe of Western liberal modernity—all those who believe in human liberty and equality and who accept the Kantian maxim that all rational persons must be treated as ends rather than means. The elements of modesty and ambition are both important. These theorists are each sufficiently imbued with post-Humean relativism as to concede the impossibility of devising a conception of justice transcending all cultural perspectives. But that limitation they seem to find largely inconsequential.¹

1. The sanguine acceptance of this limitation is what accounts for the very considerable annoyance these social theorists generate among adherents of classical philosophy. See, for example, Allan Bloom's testy complaint that "one finds no reflection on how Rawls is able to break out of the bonds of the historical or

On the other hand, each of them is convinced that his particular conception of social justice is entitled to hegemonic status among those who inhabit and accept the moral universe of modern liberalism. Despite the asterisk alongside that conviction, standing for acknowledgment of cultural limitations, this is still a very potent claim: the universe of those who do accept their fundamental moral reference points is very large; the policy implications of their principles are very significant; and their theories contradict each other.

Diametrically opposed to hegemonic theorists of social justice are the skeptics. The skeptical account denies the very possibility of social justice and disparages those who bring forward such conceptions as hypocritical or confused. The skeptic approaches justice like Pilate approached truth. He or she asks rhetorically "What is justice?"; and, failing to find anyone who can articulate principles commending universal assent, he or she takes that failure as sufficient grounds for doubting the whole notion.

The skeptics do not speak with a single voice when it comes to designating the proper basis for order and distribution in society. Skepticism about the meaningfulness of social justice may issue into Thrasymachan cynicism. "Justice" on this account is merely a word, to be put into quotation marks. It is an illusory concept, customarily deployed in a hypocritical fashion to give a cover of fraudulent legitimacy to actions based on self-interest. Since the powerful will generally be successful in imposing their will upon others, "justice" in practice receives a definition that coincides with the interests of the strongest party in society. Many postmodernists take a similar tack.

More optimistically, skepticism about social justice may go hand in hand with a relativist version of democracy. Everyone calls "just" what he or she values most, and people have different values. Since no single value or interest can be given rational or moral priority over any other, the only proper response is a policy of democratic tolerance and compromise. The "right" distribution of social resources is not determinable by principles of justice; instead, it is the outcome of bargaining among contending interest

cultural determinism he appears to accept, no reflection on how philosophy is possible within such limits" (Bloom, "Justice: John Rawls vs. The Tradition of Political Philosophy," *American Political Science Review* 69 (1975): 648-62.

groups. The cipher of "social justice" is replaced by pluralist equilibrium.²

Libertarian theorists may also deploy similar skepticism about social justice to different effect. Friedrich von Hayek's arguments concerning the "mirage" of social justice provide a classic instance of this perspective.³ As the libertarian insists, every individual has his or her own goals and his or her own standards of justice. These goals and standards differ. The goals are legitimate expressions of individual preference; and the standards are, presumably, the product of sincere belief. No one is entitled to determine for others what their goals should be; and no one seems able to gain universal acquiescence in his or her particular conception of justice. We must choose, then, between tyranny and laissez-faire: either one party gains the power to impose his or her particular standards upon unwilling and unbelieving subjects, or each individual conception should be permitted to retain sovereignty over his or her own resources. Fidelity to market outcomes, it is concluded, provides the most perfect embodiment of the latter, nontyrannical alternative.

A final variant of the skeptical position worthy of mention is the utilitarian argument that would displace social justice with prudential calculation. Different outcomes are produced under this heading, depending upon the interpretation given "utility"; but one example of this approach is found in the social philosophy of David Hume. As Hume notes, the abstract meaning of justice is "to each his due." However, he argues, it is social convention that determines what shall be "due" to particular individuals. No transcendent criterion antedates legal and conventional determination of this standard. What determines the content of social justice, then, are the overriding general interests of society; and, on Hume's account, these general interests center upon peace and security. Thus, rules of social justice are conventions of property

2. Hans Kelsen provides a candid and philosophically explicit statement of this position in his *What Is Justice?* (Berkeley: University of California Press, 1957). Assuming that the concept of justice is susceptible to the same skeptical demurrers he enters against the concept of natural right, Robert Dahl's conclusions in *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956) seem to embody a similar perspective.

3. Friedrich von Hayek, *Law, Legislation, and Liberty*, 3 vols. (Chicago: University of Chicago Press, 1973-1979), esp. vol. 2.

distribution that civil societies create and enforce in pursuit of their happiness and tranquillity.

The skeptical dismissal of social justice as a valid guide for distributive policy, therefore, may result in a variety of conclusions. It may lead to cynical realism, to a hopeful reliance upon balance of power as a tolerable substitute for an evanescent moral norm, to a principled reliance on free market allocations, or to a focus upon felicific calculi. What these views share, despite their positive divergence, is the negative starting point of skepticism about social justice—a common rejection of the claim that objective principles of distributive justice are rationally ascertainable.

The last of the three general perspectives on the concept of social justice is a pluralistic one. The pluralist position (not to be confused with the “pluralist” view of democracy) begins by contesting both the hegemonic and skeptical claims. The pluralist finds unpersuasive the hegemonic theorist’s claim that one single substantive account of social justice can be demonstrated to enjoy superiority over all others. But he or she denies the skeptic’s conclusion that a potentially infinite number of conceptions of justice can be generated—corresponding to a potentially infinite multiplicity of human interests—none of which may be deemed better than any other. Instead, on this view, theories of justice may be analytically reduced to a small finite set. No one of this small finite group of conceptions of social justice can achieve a clear-cut victory over the others. Each of them rests upon persuasive considerations adduced from rationally defensible moral principles. But, as a group, they exhaust the field of persuasive theories: no other theories are extant that can compare in logical or moral force. And hence it is not appropriate, with the skeptic, to identify conceptions of justice with mere tastes or simple interests.

In his first cut at the problem of distributive justice, Aristotle seems to adopt this pluralistic perspective. There are, he notes, two principal conceptions of social justice that clearly dominate the field: the democratic and the oligarchic conceptions. Realist that he was, Aristotle was quick to note—as the skeptic would emphasize—the close conjunction of these conceptions with specific interests. The common people tended to adopt the egalitarian standard of the democratic conception, since acting upon it would redound to their advantage. And the wealthy generally favored the proportional standard of the oligarchic conception that would

allocate differentially in accord with levels of monetary contributions and thus favor them. However, Aristotle also insists, in a nonskeptical vein, that each of these conceptions sets its standards in line with rationally defensible measures of desert. "A just distribution," Aristotle argues, "is one in which the relative values of the things given correspond to those of the person receiving." And, by this account, one can say that "both oligarchs and democrats have a hold on a sort of conception of justice."⁴ Aristotle then goes on to argue, of course, that each of these conceptions is partial, hence flawed, and that a superior conception would distribute according neither to wealth nor to fundamental human equality but rather according to "civic excellence"—defined as contribution to the *telos* of the political association. Aristotle's conception of social justice, then, may ultimately manifest hegemonic aspirations, but it contains an important pluralist moment. Between his dismissal of sophistic relativism and his final settling upon his "contribution to the general good" standard, Aristotle's keen taxonomic instincts lead him to identify a small set of conceptions of social justice, to accredit them as based upon persuasive moral principles, and to see them as both superior to other possible accounts and not decisively superior or inferior to each other.

A purer form of this perspective on social justice—one that rests content with the identification of several conceptions which possess some validity and hence cannot be decisively subdued by each other—appears in David Miller's recent volume, *Social Justice*.⁵ Miller argues that there are three distinctive criteria for social justice—rights, needs, and desert. These three criteria, he contends, "are conceptually distinct, they give rise to conflicting prescriptions for action, and there is no logical or conceptual way of choosing between them."⁶ Additionally, he contends that each of these criteria is essentially the outgrowth of a particular form of society, answering to its peculiar needs and assumptions. Thus, norms of social justice could be said not to be arbitrary. And they are limited to a small finite set of logical possibilities. But they are

4. Aristotle, *Politics*, trans. Ernest Barker (New York: Oxford University Press, 1958), p. 117.

5. David Miller, *Social Justice* (Oxford: Clarendon Press, 1976).

6. *Ibid.*, "Preface."

plural all the way down, as it were, incapable of being resolved, adjudicated, or combined into one definitive standard.

I want to set out here a variant of the pluralist, finite set argument. The notion of social justice, I want to argue in opposition to the skeptics, is meaningful and essential to a good society. Many standards or criteria for social distribution can be declared morally indefensible on rational grounds, and a good society must not allow itself to be governed by these indefensible norms. On the other hand, it is not possible for some good reasons to settle rationally upon a single rule of fairness. In contrast to Aristotle and David Miller, however, I want to argue that these reasons are internal to the notion of justice itself rather than external ones generated by particular interests or social structures.

Against the complete skeptics, we can rightly insist that some criteria or methods of social distribution are clearly unjust. It is unjust to allocate social benefits and burdens in ways that discriminate invidiously among individuals on the basis of irrelevant natural or ascriptive traits. It is unjust to distribute social benefits and burdens in an unequal and arbitrary manner. It is unjust to allocate benefits to the friends of those in power and burdens to their enemies. It is unjust to reward or punish people in ways grossly disproportionate to their relative achievement or their offense. Moreover, any rationally acceptable rules of justice must satisfy certain formal conditions, such as generality, universality, coherence, and publicity.⁷

Our rational powers, in tandem with very general moral intuitions, can take us a long way toward settling upon norms of social justice, therefore. But they cannot take us all the way there. And this area of residual indeterminacy, impervious to decisive adjudication, I want to argue, arises from what I shall call the antinomies of social justice.

These moral antinomies are formally similar to the epistemological antinomies that Kant impresses upon us. It is inconceivable for us that space or time be endless. But it is equally inconceivable for us to imagine space or time as bounded. Normally, it would

7. For elaboration of these points, see Edmond Cahn, *The Sense of Injustice* (Bloomington, IN: Indiana University Press, 1949); Kurt Baier, *The Moral Point of View*, (Ithaca, NY: Cornell University Press, 1958); and John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 130-36.

seem to follow that if A is false, not-A, its opposite, must be true. But this is not the case regarding the finitude of space and time, for here it does not follow from "A is false" that "not-A is true." Both seem false, or, more precisely, beyond our capacity to conceive and hence affirm. In the case of the antinomies of social justice, the pattern is the same. Where these antinomies appear, we cannot validly infer from the proposition "A is unjust" that "not-A is just." Instead, upon reflection it appears that a given principle of distribution and its contradictory are both inadequate.

The difference between Kant's antinomies and the antinomies of social justice is that the former are theoretical, the latter practical. The former create problems of cognition, the latter create problems of action. The epistemological antinomies can be "resolved," as it were, academically, by achieving the meta-level awareness that our minds must operate within the limits of the categories of apperception. But the moral antinomies must be dealt with politically, by fashioning principles or procedures that somehow take into account the tragic conflicts that produce them.

The antinomies of social justice have a common source. They appear where the attempt to fashion rules of fair distribution encounters elements of the gratuitous that are either (a) morally legitimate or (b) morally relevant and uneliminable. By their very nature, rules of justice are hostile—in their neutrality, universality, and generality—to all that is arbitrary in human life. And things that are gratuitous partake of the arbitrary. Gratuitous actions are rarely neutral or general in their objects, and gratuitous occurrences are rarely universal in their effects. Hence, it is essential to justice that rules of distribution override all gratuitous actions and events wherever these are controllable and morally irrelevant. This feature of justice is manifested in the spontaneous protests of children—"That's not fair!"—whenever they are dealt with in an apparently inequitable manner; and it is similarly manifested in those political theories that pejoratively contrast the "rule of law" with the "rule of men" or that define political legitimacy in part by contrasting it with arbitrary power. When gratuitous events are beyond control or where gratuitous acts have moral standing in their own right, however, they cannot simply be overridden by rules of justice. It is this collision between two morally compelling considerations or between the compelling claims of justice and the unyielding resistance of uncontrollable but morally relevant facts of life that produces the antinomies of social justice.

There are at least three significant areas in which an element of gratuitousness is either uneliminable or morally legitimate and hence not capable of being simply set aside or overridden by norms of distributive justice. The first of these is the nature of human selves. The second is the incidence of human suffering. And the third is the nature and role of the gift relationship. The presence in each of these cases of some gratuitousness that cannot (either for practical or moral considerations) be set aside produces moral dilemmas that take the form of an antinomy: we can say with some confidence that one possible way of dealing with the gratuitous inequities is unfair, but we cannot say that the logically alternative approach is therefore itself fair. Instead, the opposite of unfairness in these instances turns out also to be unfair, albeit in different ways.

Consider first the gratuitousness of human selfhood and its moral implications. Individual existence, whether considered theologically or biologically, is clearly in a certain sense arbitrary and capricious. Considered theologically, we exist through an act of divine grace. God brought us into being not by logical necessity and certainly not by our desert, but rather by a free creation *ex nihilo* out of divine plenitude. Considered naturalistically, we each are the product of a highly fortuitous union of two cells randomly selected out of millions of other cells. We may have been conceived entirely by accident, in the sense of beyond the intentions—or even against the intentions—of the parent couple. And even where it could be said that we were the product of human design, that is, of an intention to produce a child—it cannot be said that any of us as particular individuals were deliberately designed by our parents. They had to accept the results of the genetic lottery they initiated. Thus, whether we consider ourselves as creations of God or as the products of nature, our individual existence partakes of a fundamental element of the gratuitous.

These gratuitously created human selves are nonetheless morally legitimate. Indeed, one could say that their existence provides the necessary grounds for any moral notions whatever. It is hard to think of any persuasive ethical code that does not accord the welfare and the integrity of human selves a central place. Substantive conceptions of what that welfare and integrity consist in may differ, but in one form or another they provide the fundamental bases for norms of moral conduct.

These gratuitously created but morally legitimate entities are, moreover, constituted in part by attributes of body, mind, and spirit. These attributes—such as strength, intelligence, and courage—possess value in an economic sense. They are “assets” as well as constituent elements of particular concrete selves. As individuals, we both are the sum of these attributes and also could be said to possess them. This dual relationship of individuals to their attributes is captured by the alternative linguistic modes in which we characterize them. An intelligent person, for example, can be said both to *be* intelligent and to *have* a good mind.

Finally, these attributes/assets are very unevenly distributed. Some of us are comely, others plain. Some are bright, others slow. Some are strong, others weak. The grace of God or the providence of nature has not been exercised in a way that respects egalitarian standards.

Taken together, these three features of human selves (they exist gratuitously, they are morally legitimate, they are constituted in part by inequitably allocated “assets”) produce a moral tragedy. They make it impossible for any human community—family, state, or other association—to distribute its resources in a way that is beyond moral reproach. They can ultimately find no escape from a moral antinomy that flows from the coincidence of gratuitousness, inequality, and legitimacy in the very personhood of their members. The allocation of assets provided by nature is clearly unfair, because it is inequitable and arbitrary. But because these same assets are constituents of entities possessing moral legitimacy, any attempt to reallocate them by force is (except where this reallocation rectifies allocations produced by force or fraud) also subject to valid moral objection. A is unjust, but it does not follow that not-A is therefore just. Instead, it turns out to be unjust as well.

The pattern of argument in the Rawls-Nozick debate, which is in a sense merely an updated and logically sharpened version of the confrontation between Aristotle’s egalitarian and proportional conceptions of justice, manifests this antinomy. Where a moral antinomy and its attendant tragic dilemma are present, one can reasonably expect moral argumentation to assume a particular form. These arguments will be largely negative. That is, they will concentrate upon demonstrating the injustice of the rules they wish to invalidate, and they will seek to establish by implication that contrary rules are therefore morally appropriate. But, upon

examination, the positive moral argumentation on behalf of the contrary norms will turn out to be both scanty and quite weak in comparison with the powerful negative critique.

The strength of Rawls's argument, in line with this predictable pattern, is his insistence upon the moral arbitrariness of the distribution of natural talents and social advantages. No one can persuasively be said to deserve a superior intellect or a favorable social standing. Nor, therefore, can anyone be said to deserve the favored place in the distribution of resources that flows from this original arbitrary good fortune. A—the natural, arbitrary, inequitable distribution of “primary goods”—is unfair. Therefore, Rawls argues, not-A—a distribution (the difference principle) that results when the force of these morally arbitrary considerations is eradicated (by the “veil of ignorance”)—is fair.

The positive defense of not-A, the difference principle, turns out, however, to be considerably weaker. When Rawls asks “what can be said to the more favored man?” to reconcile him to the sacrifice of the fruits of his natural assets, for example, he offers the very limp rationale “that the difference principle seems to be a fair basis on which those better endowed . . . could expect others to collaborate with them when some workable arrangement is a necessary condition of the good of all.”⁸ In this positive defense, “fair” supposes the sufficiency of the negative argument, and “the good of all” is tendentiously defined. What is left is little more than a form of social blackmail in which some threaten disruption unless their interests are made paramount. And, as Nozick aptly observes, the same threat could be made with equal logic and propriety by the more favored: we'll cooperate only if we get the largest possible share of the goods that social cooperation permits.⁹

Nozick's own argument, however, only replicates from the other end this pattern of powerful critique and weak defense. He brings into relief the shaky logic and disputable assumptions in Rawls's constructive argument. In particular, he points out that the difference principle can avoid violating the Kantian maxim (treat others only as ends, never as means) “only if one presses *very* hard on the distinction between men and their talents, assets, abilities,

8. John Rawls, *A Theory of Justice*, p. 103.

9. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p.

and special traits." And he aptly questions whether, when one presses that hard upon the distinction, "any coherent conception of a person remains" and asks "why we, thick with particular traits, should be cheered that (only) the thus purified men within us are not regarded as means."¹⁰

Nozick, and other critics, find it easy to demonstrate the serious moral questions that can be raised about treating the talents of individuals as a "common asset."¹¹ Absent a compelling justification for not regarding a person's mind and body as part of his or her "self," mandatory schemes of collective provision in effect make some people part-owners of their fellow citizens. Nozick *et al.* can therefore protest the violation of personal integrity involved in such arrangements, analogize redistributive taxation to forced labor, and argue that democratic control over individual lives is tantamount to an attenuated form of slavery. When the time comes to shift from critique to affirmation, however, the strength of the argument falls precipitously.

Nozick wants to get by with the same kind of justification by default that Rawls employs. He wants his readers to conclude that if A is demonstrably unjust, then not-A must be just. Specifically, if it contravenes moral precepts against violation of personal integrity to appropriate one person's honestly acquired goods for the benefit of someone else, then we are supposed to conclude that what amounts to a market allocation should be deemed to be just. The problem is that it proves impossible to offer any robust positive defense for that latter claim. Nozick insists that, because no one can appropriate my freely acquired assets without violating my autonomy, I should be deemed to be morally *entitled* to them. But this is merely a stipulation through the bestowal of an honorific term. Normally, the concept of entitlement clearly connotes moral desert; and Nozick wants to trade upon this connotation. But he concedes that what he deems to be entitlements cannot really be claimed to be deserved in any strong or definitive sense. Any attempt to make such a claim can easily be rebutted by reminding us of the indisputable arbitrariness of the natural distribution of assets.

10. *Ibid.*, p. 228.

11. Rawls, *A Theory of Justice*, p. 101.

Neither Rawls nor Nozick can make a definitive case. Neither can triumph over the other. Instead, taken together their competing claims point us toward one of the central antinomies of social justice. Because of the gratuitous and inequitable distribution of the natural talents that constitute part of our individual selfhood, both can sustain their claims about the injustice of the distributive norms they oppose but neither can sustain their claims about the justice of the distributive norms they support. Rawls is right to insist upon the unfairness of our unequal natural endowments, but wrong to assert the justice of the difference principle. Nozick is right to insist upon the injustice of forcefully appropriating legitimately acquired goods, but wrong to claim that market distributions are therefore morally sacrosanct. When it comes to the question of distributing the fruits of our natural endowments, A is unjust but not-A is unjust also. The tragedy of life makes complete social justice an impossibility. Even assuming the best will in the world, no human society can fully escape the painful consequences of the moral antinomy produced by the coincidence of gratuitous inequality and moral legitimacy in the phenomenon of human selfhood. A society is in a real sense damned if it does and damned if it doesn't. In the one case, it visits unwarranted losses on innocent members; in the alternative, however, it acquiesces in—and hence ratifies and enforces—the equally unwarranted relative deprivation of other equally nonculpable members.

The situation is much the same when it comes to the problem of allocating the costs of human suffering, insofar as these are redistributable.

The hazards of life inflict suffering on people. The incidence of this suffering, absent a belief in *karma*, must be characterized as random and arbitrary—at least in significant measure. If I ride my motorcycle without wearing a helmet and suffer brain damage in a collision, then my lack of due care was an important contributing cause to my misfortune. The same could be said if I contract lung cancer after smoking two packs a day for twenty years. Even there, however, some arbitrariness and hence unfairness obtains, for others who ride bare-headed or smoke heavily manage to escape injury and disease. And in many other cases, I may suffer harm without bearing any responsibility whatever for my misfortune: I could be orphaned young, be abused as a child, be struck by lightning, suffer from a learning disability, or cripple myself by falling on an invisible patch of ice.

This array of arbitrary suffering is, moreover, not equitably distributed. Some suffer undeserved hardship. Others, by no particular merit of their own, escape. Thus, the pattern of allocation of the suffering is unfair—because not evenly distributed—just as the particular incidence is unfair—because it is undeserved. And despite our best efforts, we cannot eliminate the presence of this doubly unjust aspect of human existence. Technological advances, particularly in medicine, have brought the human estate some relief from injuries and illnesses suffered by those in centuries past. But all those advances taken together can only be palliatives, not panaceas.

The coincidence here of arbitrariness and inequity once again faces any well-intentioned human society with a moral dilemma. How can it fairly allocate the costs of this suffering and / or the costs of mitigating it? One standard view argues that any redistributions of collectively financed ameliorative measures are neither called for nor just. The argument begins with the moral premise that no one is justified in imposing on others the costs of his or her problems for which those others are not responsible (in the sense of causally responsible for inflicting the sufferings upon them). The policy conclusion drawn from this premise, then, is reflected in such homely maxims as “every tub on its own bottom” and “all have to play the cards that life deals them.” The opposing argument starts with the equally sound premise that it is clearly not fair that some people have to bear inequitable burdens that are visited upon them arbitrarily. The policy conclusion drawn from this premise, then, is that it is only fair and proper for society to cause this undeserved suffering to be shared more equitably by imposing some of its costs upon the lucky ones.

Both arguments seem convincing, but neither can be convincing unless the other be vanquished. And that kind of victory is not possible, for the opposing arguments rest upon equally sound moral intuitions. The problem, once again, takes the form of a moral antinomy. In both instances, the apparently logical conclusion cannot validly be drawn from an apparently sound premise. A is unjust, but it does not follow that not-A is just. It is unfair that some suffer by chance while others avoid their fate, but it is not therefore fair to impose the costs of that suffering upon the previously unscathed. It is unfair to visit one's suffering upon others, but it is not therefore fair that you be left to bear your undeserved

suffering on your own. There is no just and fair answer, only a collision of unfairnesses created by the fickleness of fate and the niggardliness of nature.

The structure of the law of torts bears testimony to this antinomy. We find there two competing rules for allocating the costs of unintentionally inflicted suffering. Suppose, for example, that I give you a playful pat on the head and you suffer serious injury because you have an eggshell skull. Who should pay the hospital bills? The real "fault" here lies with a capricious nature that has gratuitously and inequitably left you in unusual peril. But nature won't pay. One well-established rule of tort would require me to pay on the grounds that when harm occurs in an encounter between innocents the person causing the harm should pay. From one perspective this rule is logical and proper, for it is undeniably unfair to burden you with the costs of a condition that you neither caused nor deserved; and my action was a contributory factor in the damages caused, however unforeseeably and unintentionally. The competing rule, however, imposes no liability without fault; and on this rule I would not have to pay. Once again, good logic and morally sound assumptions support this outcome. For it seems clearly unfair to assess me for the unforeseeable and unintended consequences of an innocent action that would have had no untoward consequences apart from your genetic misfortune. The unhappy fact is that both rules are equally fair yet equally unfair. The law here simply runs aground on the hard shoals of the moral antinomy created by the inequitable incidence of gratuitous suffering in the world.¹²

The same problem accounts for the intractability of debates over reverse discrimination and certain social insurance schemes. Those who advocate programs of reverse discrimination to counter disadvantages created by historical injustices, of course, are arguing for the redress of socially inflicted wrongs rather than for the remediation of naturally inflicted suffering. But when the injustices for which redress is sought occurred without the conniv-

12. Indeed, one recent account of this area of tort law explicitly invokes the language of antinomy in characterizing the opposing positions. See J. M. Balkin, "The Crystalline Structure of Legal Thought," *Rutgers Law Review* 39 (1986): 1-110. I am indebted to T. K. Seung for bringing this example to my notice in his paper "Constrained Indeterminacy", presented at the 1990 meeting of the American Political Science Association.

ance—and possibly prior to the existence of—those from whom reparations are demanded, the moral situation is essentially similar. Sufferings caused by persons long dead and events long past are tantamount to natural disasters from the perspective of the unfortunate legatees. Thus the advocates of reverse discrimination or other schemes of reparation can argue with full justice that any burdens they labor under which stem from historic oppression place them unfairly at a disadvantage. A is unjust. But it may not follow unproblematically, again, that not-A is just. For imposing reparations runs into equally cogent objections from the antinomial position. It is clearly unfair, says the son of a Greek immigrant who came penniless to these shores in 1970—a century after the demise of slavery and several years after the enactment of federal laws against discrimination in schools, housing, and public accommodations—that I should forfeit a job or school admission because of statutory quotas or other preferences that work against me. Not-A is unfair also.

These debates may lessen in incidence and intensity as the last generation that experienced Jim Crow institutional patterns dies out, but advances in medical technology will likely intensify parallel debates concerning public financing of health care. Not long ago, those who suffered the failure of a major organ such as the heart or liver simply died. Now, they can in many cases be saved—but at enormous cost. As the cases and the aggregate costs multiply exponentially, the moral dilemma for social policy will become very painful. And there will be no just or fair solution, owing to the antinomy observed here. No doubt I do not deserve to die from my congenital heart defect. But how much can those not so afflicted be expected to sacrifice of their own life chances to spare me and those similarly situated? If most of our life is behind us already? If the education of children or the prenatal care of expectant mothers must be compromised? Difficult questions indeed, with no right answers.

The third and final antinomy of social justice I shall mention is the moral problem posed by what we can call the gifts of love. The background premises, moral and empirical, that create this antinomy are as follows. First, love is a widespread, natural, and normal human emotion. Second, human love is both free and tends to be discriminating. Divine grace may send the sun to shine and rain to fall upon all of us without distinction; but human beings

tend to bestow their love on particular individuals who are sharply differentiated from the rest—on friends, family, and lovers. Third, love is morally legitimate. It is a positive and constructive force in human relations, potentially ennobling and fulfilling. Ethicists as different as St. Paul and Freud have accorded it centrality in their scheme of values. Fourth, love finds expression in the bestowal of gifts, whether these be affectionate glances, hugs, diamonds, or trust funds. Finally, the recipients of love and its attendant gifts are generally for the most part undeserving of what they receive. Moral cretins may have benevolent parents and comely profiles that bring them generous estates and devoted lovers, the fruits of *caritas* and *eros*. Conversely, decent and humane individuals may have cold parents and an absolute dearth of erotic appeal.

Taken together, these realities and assessments produce a morally problematic outcome. Love is morally legitimate; but because it is gratuitous, partial in its objects, and beneficent in its expression it leads to undeserved inequalities. Undeserved inequalities are unfair. How, then, should a society determined to be just respond to this situation?

For some reformers, justice is deemed to require a redistribution of the fruits of private beneficence. Undeserved inequalities need not be tolerated, for a society that leaves them intact is ratifying a clearly unfair situation. The gifts of love are distributed arbitrarily from the standpoint of justice, and a good society not only may but must attempt to redistribute them in accordance with moral norms.

The most extreme suggestion along these lines in the history of political theorizing was probably that made by the French philosopher Helvetius. Helvetius found it irrational and unfair that the amorous favors of attractive women were so randomly allocated from the standpoint of justice and utility. How much better it would be for society, he opined, if the most desirable females were "consecrated to merit" and carried off as prizes by the most valiant warriors or other notable contributors to the social good. "Women who everywhere else seem . . . to be made only for the ornament of the earth . . . might be applied to a nobler use . . . might at length become one of the most powerful springs of legislation."¹³ Thus,

13. Claude Helvetius, *De l'Esprit, or Essays on The Mind* (New York: Burt Franklin, 1970), pp. 280-81.

along with a Silver Star, the recipient might receive a Dallas Cowboy cheerleader. And this scheme could easily be expanded from Helvetius's male chauvinist formulation to encompass both sexes and all erotic persuasions.

The overriding difficulty with such a suggestion, of course, is its complete infringement of the liberty and integrity of the donors who, in being thus "consecrated to merit," would become in effect chattel of those to whom they were awarded and of the society that had appropriated their services. No reasonable person would take Helvetius's brainstorm seriously. But his idea is a perfectly logical extension of the demands of justice and utility (these were synonymous for Helvetius) to eliminate the morally arbitrary allocation of the valued goods. And the grave problems with his idea provide a sharp expression of the moral antinomy that besets policies concerning the gifts of love.

This antinomy is less stark but still present when it comes to more easily alienable gifts prompted by affection.¹⁴ One need not wander into proposals as adverse to human autonomy as that of Helvetius to ask, for example, whether it is fair for some children to receive the benefits of a quality private education while others are relegated to inferior public institutions. Fairness would seem to require an end to such inequities and the differentiation of life chances they carry with them. And wouldn't it be only fair to preclude anyone from receiving a generous inheritance when others less favored start life with nothing? Such morally capricious inequalities are clearly unjust, so it would seem to follow that a good society should prevent them by proscribing above-public-school level expenditures on anyone's education and by the imposition of a confiscatory inheritance tax.

But, protest the defenders of individual rights, surely such intrusive and restrictive policies are themselves unfair, as well as being morally perverse in their consequences. How can it be fair to prevent parents from using their honestly earned resources to

14. James Fishkin provides a good account of some of the deep policy and moral dilemmas in this area in his *Justice, Equal Opportunity, and The Family* (New Haven and London: Yale University Press, 1983). As he notes there, the "core process equalities" dictated by schemes of liberal justice have a "truly radical character . . . when taken seriously" (p. 168). Full equality of opportunity, for example, is not compatible with the institution of the family.

provide goods for their children in ways that do not violate anyone else's rights or damage them in any way—other than in the abstract and relative sense that not everyone else is provided for in equal measure? Where is the justice in barring me from buying my daughter a new bicycle so long as another child must walk or baking my son a pie so long as some other parent can't cook? Where is the justice—not to mention the prudence—in allowing me to squander my worldly goods in bacchanalian excess but in preventing me from bestowing them on my cherished friends and family members to underwrite their constructive endeavors?

The basic dilemma here is that the dictates of fairness *vis-a-vis* gifts of love differ, depending upon whether the concern focuses upon justice to the donor or justice to the pool of potential recipients. Since you cannot have gifts without both a giver and a recipient, the moral antinomy comes into play. A is unjust, but it does not follow that not-A is just; instead, not-A appears to be unjust as well. It is unjust that some receive disproportionate benefits from the free gifts of those who favor them, but it does not follow that it is just to impede or expropriate these gifts. It is unjust to the affectionate or philanthropic to prohibit them from "spending" their honest earnings on behalf of those they love, but it does not follow that the resultant distribution of goods can be deemed fair.

If the preceding argument is correct—not necessarily in all of its details, but at least in its fundamental claims—it follows that no determinate theory of social justice is possible. It is impossible to produce such a definitive conception not because the notion of distributive justice is cognitively meaningless. For in fact, we can upon examination disqualify all sorts of possible criteria for allocating social goods as rationally indefensible and therefore morally untenable. And it is impossible not simply because very different forms of society will tend to find different distributional criteria more fitting for their purposes, although that is undoubtedly the case. It is, instead, impossible because elements of moral tragedy endemic to human existence create what we have called the antinomies of social justice. The circumstances of social cohabitation create certain instances in which morally valid imperatives simply collide with each other. The heart of the problem is that rules of justice cannot accommodate gratuitousness, but some

morally crucial entities (particular and autonomous human selves) and some morally important actions (love and its gifts) are intrinsically gratuitous. In addition, some human suffering will be gratuitous in the sense of unrelated to any criteria of desert however it is distributed. Thus, when reason's important critical role in creating a just society has been accomplished, what we can expect to be left standing is not a single coherent and inviolate standard for fair distribution but instead a small core of standards that are not fully reconcilable with each other. Each of these can be convincingly defended, but none can attain complete rational hegemony because of the equally valid and competing claims of the surviving alternatives. The antinomies of social justice permit us to go no farther.

If that be so, then it seems clearly unreasonable for us to anticipate that a particular conception of social justice could serve as the sufficient basis of social consensus in a free society. The noble efforts of Rawls and his competitors in the theory-of-justice sweepstakes of recent years, therefore, must ultimately prove to be unavailing. However useful and illuminating their analyses of social justice have been, none of them can succeed in definitively vanquishing the others and engraving his or her own distinctive principles into liberal democratic constitutions. A lively sense of justice is important to the health of free societies, but it is not the sufficient source of their social consensus. Even within our own particular liberal democratic tradition, such a univocal outcome cannot be expected. Instead, some umbrella of social cooperation will need to cover the devotees of the various defensible conceptions of justice—the Rawlsians, Nozickeans, Ackermaniacs, utilitarians, and others who will continue their arguments in our midst.

The logical contenders for the source of social consensus needed to supplement the limited capabilities of substantive conceptions of social justice in this respect are self-interest and civic friendship. Rawls was dubious about the capacity of either of these to play the role of grounds-for-consensus he hoped to find in a common sense of justice. Self-interest seemed inadequate because of its lack of moral standing and its limitations as a source of social cooperation. Civic friendship he seemed to consider more or less unattainable by contemporary advanced societies because of the "fact of pluralism." True friendship, as Aristotle tells us, is predicated upon a common attachment to a particular conception of the

good; and Rawls's supposition is that the moral and religious pluralism of modern societies precludes having such a common attachment. Whatever the problems with self-interest contractualism and civic friendship, however, one or both of them would seem to be a necessary complement to the important but nonetheless intrinsically limited consensus-forming capabilities of a devotion to canons of neutral justice.

My own sense is that the possibilities of both self-interest and civic friendship are worth exploiting by liberal democracies in their efforts to countervail the natural conflicts and anarchic tendencies that are an inevitable part of their existence. Any port in a storm. The beauty of recourse to rational self-interest, or course, is the unassailability of its appeal. Who, after all, can deny the rhetorical force of Benjamin Franklin's admonition to his compatriots that "we must all hang together or else hang separately"? And the purely prudential realities of social life and the value of social cooperation permit many valid variants of this admonition. Rawls himself, normally dismissive of mere *modus vivendi* justifications of political practices, seems to fall back upon them in some places—as, for example, when he tells the more favored members of society that their acceptance of the difference principle may be seen as the necessary price of a social cooperation that is essential to them.¹⁵

Appeals to enlightened self-interest as the basis of social consensus for a free society, however, also have their serious limitations. Because of these limitations, which cannot be adequately canvassed here, the ingenious attempts to update Hobbesian contractualism by theorists such as David Gauthier and the provocative attempt by Richard Rorty to give a post-modernist rendering of a basically Humean conventionalist *modus vivendi* justification of liberal democracy are not fully convincing.¹⁶ A purely Hobbesian politics of self-interested rationality is, however benignly construed, never more than a fragile truce among natural enemies. At its best, it produces a politics of grudging hard bargains and extraordinary litigiousness. It seems more like half

15. Rawls, *A Theory of Justice*, p. 103.

16. See David Gauthier, *Morals by Agreement* (New York: Oxford University Press, 1986), and Richard Rorty, *Contingency, Irony, and Solidarity* (New York: Cambridge University Press, 1989).

chaos, half tyranny (whether bureaucratic or judicial) with the visage of leviathan always lurking in the background than it resembles the ideal of ordered liberty. And the wholly contingent conventionalism of post-modern *bon sens*, as Rorty himself seems to recognize, places a considerable strain on the credulity and psychic coherence of its participants. It may be adequate for a disenchanted intellectual elite, but the breadth of its appeal is questionable. Hume can, after his devastatingly skeptical critiques, return to his game of backgammon; and Rorty can return to his ivory tower. But most don't possess such a capacity for ironic detachment. Moreover, most people may not, for ample reason, accept the largely undefended normative priority accorded by Hume and Rorty to peace and security or share their largely undefended tacit conception of what it means to be moderate and sensible.

Against the background of the limitations of both justice and self-interest as grounds of liberal democratic social cooperation, therefore, it behooves us to take seriously what I take to be the moral and political burden of Michael Sandel's critique of the priority of justice in liberalism.¹⁷ Setting aside the whole issue of the metaphysics of selfhood that Sandel alleges to be intrinsic to deontological liberalism and that Rawls later sought to disavow, Sandel's argument at the political and practical level is this: the citizens of a free society need to relate more fully and concretely to each other than Rawls (or Gauthier or Rorty) suggests if they are to "share one another's fate" in the way he desires. Or, put more generally still, the members of a good and stable liberal democracy must in some measure relate to each other as friends and not merely as common adherents of an abstract conception of justice or as people who happen in some respects to be in the same boat. The force of this argument is only deepened, I would contend, by our recognition of the antinomies of social justice. For these antinomies make it exceedingly unlikely that even a people of great good will and devotion to justice will reach agreement at this level.

The implication of my argument, then, is that when it comes to the question of the moral basis or the grounds of consensus for a free society, liberal democracies attuned wholly to strategies de-

17. Michael J. Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982).

rived from Hobbes, Hume, and Kant may encounter difficulties when they inevitably encounter the antinomies of social justice. It would be easy for such societies to devolve into a claue of warring factions, each insisting stridently upon its own tendentious conception of justice and/or its own self-interest. (And these two sources of political contention obviously reinforce each other. As someone who worked in a congressional office once said to me: "No one ever comes in here seeking a favor. All they want is a fair advantage.")

The best resource for bridging over and buffering this natural disintegrative tendency of free societies is a political culture that responds to the antinomies of social justice by seeking principled compromises through deliberative practices and institutions. That is why, in my view, the more "process oriented" approaches to social justice articulated by theorists such as Michael Walzer and James Fishkin are ultimately both more compelling and more practicable than any attempt to specify philosophically a particular substantive standard of justice to be deemed determinative of liberal democratic legitimacy.¹⁸ I would contend, moreover, that recent experimental evidence can reasonably be construed as providing empirical sustenance for this approach. For Norman Frolich and Joe Oppenheimer found that when their subjects were required collectively to choose the distributive principles governing a work project, they deliberated seriously and most of the time reached agreement upon a compromise that incorporated considerations both of meritocratic entitlement and egalitarian fairness. The experimenters also made the equally interesting discovery that participants who deliberatively determined their own distributive principles exhibited both a greater attachment to these principles and a greater willingness to exert themselves when operating in accord with them than did those who had the same principles established for them by others.¹⁹

Behind the willingness and ability to enter into good faith deliberation and to accept principled compromises as legitimate,

18. See Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983) and James S. Fishkin, *The Dialogue of Justice* (New Haven and London: Yale University Press, 1992).

19. Norman Frohlich and Joe A. Oppenheimer, "Choosing Justice in Experimental Democracies with Production," *American Political Science Review* 84 (1990): 461-80.

however, lie some minimal bonds of civic friendship. A citizenry divided into groups that consider each other morally alien competitors will find the institutions and practices of political deliberation very difficult to sustain. Absent some sense of participation in a mutual enterprise devoted to common and legitimate ends, the trust, moral respect, and mutual concern that permit people to engage in genuine deliberation tend to wither. As a practical matter, therefore, the classical and republican concern with the ideal of the common good and the requisites of civic friendship needs also to be a concern of a liberal democracy that wants to be legitimate, stable, and free. We should not, as a consequence, succumb too easily to the blandishments of deontologists, rational choice theorists, and postmodernists who would have us abandon these traditional sources of social union as impossible, unnecessary, or undesirable. Instead, because of the volatility of unadorned self-interest as a source of social cohesion and because of the antinomies of social justice, we would be well advised to maintain an appreciation of the value of civic friendship and devotion to the common weal—however difficult these may be to achieve in a modern pluralistic society.